

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6772 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? NO.

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?

NO.

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HMP CEMENTS LTD.

Versus

STATE OF GUJARAT

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Appearance:

MR BR GUPTA for Petitioners

PUBLIC PROSECUTOR for Respondent No. 1

MR JD AJMERA for Respondent No. 2

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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 04/03/98

ORAL JUDGEMENT

1. Petitioners have filed this application under Section 482 of the Code of Criminal Procedure ('Code' for short) to quash the F.I.R. registered before Kamalbaug Police Station vide Cr.No. I-255/97, dated 18-11-97, lodged by the respondent No.2, for the offences punishable under Sections 405, 406 and 34 of the Indian

Penal Code for not paying/depositing the amount of the provident fund dues.

2. The brief facts leading to the filing of the present application are as under :

In December 1989, the petitioner No.1 purchased a sick mini cement plant situated at Porbandar from the Associated Cement Companies Ltd. (ACC) employing about 500 persons. After the purchase of this mini cement plant, the petitioner No.1 was facing increasing problems. But even then, it continued with the operations with a view to provide continued employment of its work force and in the hope that things may improve in future. The employees working in the petitioners' cement unit started agitation from 22-10-97 on the issue of payment of bonus over and above the statutory requirement, which finally culminated in complete closure of the manufacturing plant from 26/28-10-97. Due to financial responsibilities, the petitioner-company was unable to fully deposit with the respondent No.2 the employees' and employers' share of provident fund contribution as required under the law.

3. On 5-11-97, the petitioner-company approached this High Court by filing Special Civil Application No.8119/97 against the respondent No.2 interalia seeking directions for payment of the balance amount of arrears of provident fund dues by way of easy monthly instalments without recourse of any coercive action in the matter. At the time of hearing of the said petition on 10-11-97, the petitioner-company interalia stated before this Court that pursuant to the respondent No.2's notice under Section 7-A of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952, it is required to attend before the concerned officer on 12-11-97 and as the petitioner intends to appear before that officer and requests for instalments, the said Writ Petition came to be adjourned to 20-11-97. Petitioners' representative presented himself before the respondent No.2, but there was no positive response from him. The said Writ Petition is at present pending bipartite hearing before this High Court. On 18-11-97, petitioner No.1 with a view to ensure that the respondent does not take any coercive action against the petitioner No.1-Company and his Directors, petitioner-company deposited with the respondent No.2's bankers, the State Bank of India, a sum of Rs.8,37,129/- covering employees' share of contribution of provident fund for the months of July and August 1997 amounting to Rs.6,50,070/-. It is stated that despite this, on 29-11-97 petitioners learnt that on

18-11-97 at about 20-45 hours, respondent No.2 has filed an F.I.R. at Kamalbaug Police Station at Porbandar for the offences as stated above.

4. The learned advocate for the petitioners has strenuously urged that, without following the procedure prescribed under Section 7 and 8 of the Act, and without determining the arrears of provident fund dues, the complaint was lodged by the Provident Fund Inspector before Kamalbaug Police Station, Porbandar and therefore, it requires to be quashed. The submission of the learned advocate for the petitioners is devoid of any merit. This Court, at the stage of hearing petition under Section 482 of the Code, is only required to see whether allegations in the first information report, *prima facie*, establish offence alleged against the petitioners. It is an admitted fact that the petitioners have failed to pay provident fund dues for the period July 1997 and August 1997. They have paid the dues after lapse of considerable time, and, therefore, it is clear that they had retained and dishonestly used the amount of provident fund contribution of the employees. In this connection, it would be worthwhile to refer to Explanation 1 of Section 405 of the Indian Penal Code, which reads as under :

"Explanation 1 .- A person, being an employer, of an establishment whether exempted under Section 17 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ( 19 of 1962) or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

5. Reading Explanation 1 to Section 405, it is evident that the petitioners have, *prima facie*, committed offence of criminal breach of trust for which they are liable to be tried for the offence punishable under Section 406 of the Indian Penal Code.

6. The submission of the learned advocate for the petitioners that a stereotype cyclostyled complaint is

lodged before the concerned police station, is devoid of any merit. In the complaint, the Provident Fund Inspector has specifically mentioned that the petitioners have not paid amount of Rs.6,50,070/- towards provident fund dues for the period July 1997 and August 1997. There is no prescribed form of complaint, which is to be lodged with the concerned police station. The purpose of filing first information report is to make the Investigating Agency aware about the commission of offence. The first information report ( at Annexure "A") clearly shows that the petitioners have not paid provident fund dues and the petitioners, who are in-charge of the management of the company and who are responsible for the conduct of business of the company, are liable to be prosecuted for the alleged offence.

7. The submission of the learned advocate for the petitioners that, without following due procedure as prescribed under the act, the first information report is lodged, is also devoid of any merit. At the stage of quashing complaint, this Court is not required to look into defence of the petitioners, which may be led at the time of trial. Whether due procedure was followed by the Authority or not, requires investigation of facts, which can be gone into at the stage of trial.

8. The learned advocate for the petitioners has also argued that, in the complaint it is not averred that all the petitioners are in-charge of the company and are responsible for the conduct of affairs of the company, as prescribed under Section 14A of the Act. It must be stated that, in the complaint, it is specifically stated that the petitioners are responsible for the conduct and administration of the company and the names of the petitioners have been shown in the complaint as the persons who are in-charge of the management of the company. The learned advocate for the petitioners, in support of the submission that all the petitioners were not in-charge of the company and they are not liable to be prosecuted for the alleged breach, has relied upon the decision of the Supreme Court, in the case of Delhi Municipality vs. Ram Kishan, reported in AIR 1982 Supreme Court 67. In the case of Ram Kishan (Supra), in paragraph 15, the Supreme Court has made following observations :

" So far as the Manager is concerned, we are satisfied that from the very nature of his duties, it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of

an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the observation of the High Court that no case against the Directors (accused Nos. 4 to 7) has been made out ex-facie on the allegations made in the complaint and the proceedings against them were rightly quashed."

9. In the case before the Supreme Court, there was not a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there was any act committed by the Directors, from which a reasonable inference can be drawn that they could also be vicariously liable. In the present case, the complaint has clearly alleged in the complaint that the petitioners are in-charge of the management of the company and they are liable to be prosecuted for the alleged breach. However, it should be stated that whether the petitioners are in-charge of the management of the Company or not, is a disputed question of fact, which can be only decided at the time of trial and, therefore, the submission of the learned advocate for the petitioners that all the petitioners are not in-charge of the management of the Company, and they are not liable to be prosecuted for the alleged breach, is devoid of any merit.

10. In the facts and circumstances of the case, I am of the opinion that this is not a rarest of rare case where interference of this Court in exercise of its inherent powers under Section 482 of the Code is called for.

11. As a result of foregoing discussion, this application is rejected. Rule is discharged.

12 At this stage, the learned advocate for the petitioners has requested to stay operation of this order so as to enable the petitioners to approach the higher forum.

13. In view of the facts that this Court has not granted any interim relief of staying investigation, at any stage, in favour of the petitioners, the request made

by the learned advocate for the petitioners is rejected.

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